dismissed, but that a declaration must be given in favor of the plaintiff to the effect that the defendant has no *howladari* interest in the lands covered by the suit; and in this respect the decree of the Court below must be altered. 1886

As regards the costs of the suit, we think that each party, having set up a case which is either false or unproven, they should bear their own costs in both the Courts.

J. V. W.

Decree varied.

Before Mr. Justice Mitter and Mr. Justice Norris.

NAUN SINGH (PLAINTIFF) *v.* RASH BEHARI SINGH AND OTHERS (DEFENDANTS).* 1886 *April* 30.

Valuation of Suit—Suit for pre-emption—Jurisdiction—Bengal Civil Courts Act (VI of 1871), s. 20.

In a pre-emption suit, the subject-matter is the right of pre-emption, the value of which, and not that of the property itself, determines the question of jurisdiction under s. 20, Act VI of 1871.

THIS suit was brought for the enforcement of the plaintiff's right of pre-emption. The property in dispute was sold to the defendants for Rs. 700. The plaintiff sought to recover possession of it by the cancellation of the aforesaid sale on payment of Rs. 700 to the defendants (purchasers.) The suit was brought in the Munsiff's Court. The defendants amongst other pleas objected to the jurisdiction of the Court, on the ground that the property sought to be recovered was of the value of more than Rs. 1,000.

The Munsiff overruling this objection dismissed the suit upon the merits. The plaintiff preferred an appeal against the Munsiff's decree. The Subordinate Judge, on the objection of the defendants, re-opened the question of jurisdiction, and finding that the property in dispute was of the value of more than Rs. 1,000 dismissed the suit upon the ground that the Munsiff had no jurisdiction to entertain it.

* Appeal from Appellate Decree No. 1257 of 1885, against the decree of Baboo Abinash Chunder Mitter, Subordinate Judge of Patna, dated the 27th of March 1885, affirming the decree of Rai Baboo Sheo Sarun Lal Bahadur, Munsiff of Patna, dated the 28th of April 1884.

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it seems to us that in determining the question whether the value of the subject-matter in dispute in this case is above Rs. 1,000, the lower Appellate Court has proceeded upon an erroneous principle. As already remarked, it is not possible to lay down any hard and fast rule for measuring the value of a right of pre-emption in any particular case. But the lower Appellate Court in this case, for reasons already given, was not right in measuring it by the value of the property itself without taking into consideration the fact that the plaintiff has offered to pay to the defendant Rs. 700, and would be bound to make the payment before he could succeed.

It has not been shown therefore that the Munsiff was in error in holding that he had jurisdiction to entertain the suit. That being so, the Subordinate Judge's judgment cannot stand. We therefore reverse that judgment and send back this case to that Court to decide the appeal on the merits. Costs will abide the result.

K. C. M. *Case remanded.*

Before Mr. Justice Prinsep and Mr. Justice Beverley.

SRIHARY MUNDUL (JUDGMENT-DEBTOR) *v.* MURARI CHOWDHRY AND ANOTHER (DECREE-HOLDERS).*

1886 *July* 2.

Limitation—Execution of Decree—Jurisdiction of Court where decree was passed—Transfer of decree for execution—Code of Civil Procedure, ss. 223, 239, 248.

On the 4th of March 1884, a decree-holder applied to the Court of the Subordinate Judge of Moorshedabad (where the decree was passed) for transfer of the decree to the District Court of Beerbhoom for execution. The transfer was made, and, on application by the decree-holder, the judgment-debtor's properties in Beerbhoom were attached. Thereupon the judgment-debtor objected to the attachment, and obtained an order under s. 239 of the Code of Civil Procedure staying the execution proceedings. The judgment-debtor then applied to the Court of the Subordinate Judge at Moorshedabad objecting to the execution of the decree, on the ground that it was barred by limitation. The objection was overruled by the Subordinate Judge, and his

* Appeal from Order No. 150 of 1886, against the order of T. D. Beighton, Esq., Judge of Moorshedabad, dated the 19th of January 1886; affirming the order of Baboo Nobin Chunder Ganguli, Subordinate Judge of Moorshedabad, dated the 22nd of September 1885.

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decision was upheld on appeal to the District Judge. On second appeal to the High Court,

Held, that the Moorshedabad Court was competent to hear and determine the plea of limitation.

Held, also, that the fact of the judgment-debtor's not raising the plea of limitation in the Beerbhoom Court did not, under the circumstances, preclude him from relying on it in his subsequent application to the Court at Moorshedabad.

THIS was an application for execution of decree. The judgment appealed from was, so far as material, as follows:—

"The dates in connection with this appeal which relates to the execution of a decree are as follows:—

Decree obtained in the Court of the Subordinate Judge of Moorshedabad	5th May	1877
First application for execution		1878
Struck off	June	1878
Second application	22nd December	1880
Notice to judgment-debtor	14th January	1881
Served	28th January	1881
Struck off for default	19th April	1881
Third application containing a prayer for transfer to the Court of the Subordinate Judge of Beerbhoom where the judgment-debtor's property is situated...	4th March	1884

"Subsequently an order for sale of certain property took place at Beerbhoom, but no sale has actually occurred.

"Finally the judgment-debtor applied to the Subordinate Judge of Moorshedabad alleging that the third application was barred, and praying for an order to stay execution at Beerbhoom. The execution proceedings have been stayed, but the Subordinate Judge has decided the present application in favour of the decree-holder, considering that the application is not barred.

"Against this decision both parties have appealed, the judgment-debtor urging that the proceedings are barred, and the decree-holder by way of cross-appeal argues that the Subordinate Judge of Moorshedabad had no jurisdiction to try the objection which ought to have been made at Beerbhoom.

"Before deciding the main point at issue I deal chiefly with the argument of respondent that the third application was not barred by limitation when presented. The order of 19th April was that

the decree-holder do pay into Court two annas postage stamps and 'the decree (*sic.*) within five days.' This was apparently not done, and the case was struck off for default on the 19th April. The respondent argues that there being no provision in the Civil Procedure Code for 'striking off' an execution proceeding, the application was never dismissed, and the decree was alive on 4th March 1884. He cites a case of *Biswa Sonan Chunder Gossyamy* v. *Binanda Chunder Dibingar Adhikar Gossyamy* (1) in support of this view. This case does not apply here; for whether the expression 'struck off' in the present proceeding was the correct one or not the order passed certainly amounts to a dismissal. The order was not passed by the Court for its own convenience, or of its own motion, but after default had been made by the decree-holder in carrying out an order passed by the Court. No steps were taken by the decree-holder under s. 108 of the Civil Procedure Code to get this order set aside, and no step in aid of execution having been taken between January 1881 and March 1884, the decree was at this latter date barred by limitation.

"The main question is whether the decree has been revived by the proceedings in the Court of Beerbhoom, or rather whether the judgment-debtor, having neglected to plead limitation in the proper Court, is now precluded from raising the point at Moorshedabad. A number of authorities have been cited as regards the powers of a Court executing a decree sent to it for execution, and I have considered these very carefully. The principal authority is the case of *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (2). The following principle appears to have been established by this case even if the proceedings were (as they undoubtedly were) barred by limitation when the decree reached the Beerbhoom Court. The order of the Beerbhoom Court allowing execution to revive, is, if unreversed, valid, provided that the Beerbhoom Court had jurisdiction to try whether it was barred by time or not."

The learned Judge then went on to discuss the cases of *Mina Konwari* v. *Juggat Setani* (3); *Lutfullah* v. *Kirat Chand* (4);

(1) I. L. R., 10 Calc., 416. (2) I. L. R., 8 Calc., 51.
(3) I. L. R., 10 Calc., 196.
(4) 13 B. L. R., Ap., 30; 21 W. R., 330.

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Nursing Doyal v. *Hurryhar Saha* (1); and *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (2). He found that the Beerbhoom Court had acted with jurisdiction, and he held that the proceedings were not barred by limitation.

The judgment-debtor appealed to the High Court on the following grounds: (1), that the case of *Mungal Pershad Dichit* had no application to the present case, as the proceedings in the Beerbhoom Court were not brought to the knowledge of the judgment-debtor, and no notice of the application of the 4th of March had been served on him; (2), that the Judge was wrong in deciding against the judgment-debtor without finding whether he had or had not notice of the proceedings in the Beerbhoom Court; (3), that the judgment-debtor was not bound to take the plea of limitation in the Beerbhoom Court, and that he was entitled to take it in the present proceedings.

Baboo *Troyluckho Nath Mitter* and Baboo *Rutnessur Sen* for the appellant.

Baboo *Nil Madhub Sen* for the respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

This appeal relates to the execution of a decree passed by the Subordinate Judge of Moorshedabad, which has been transferred under s. 223 of the Code of Civil Procedure, to the District Court of Beerbhoom. The application for transfer was made on the 4th March 1884, and before transferring the decree, the Subordinate Judge of Moorshedabad issued the notice required by s. 248 on the judgment-debtors. After report made of due service, the proceedings requisite for transfer of the decree were taken. On the application of the decree-holder, certain properties belonging to the judgment-debtors were attached in the district of Beerbhoom, on which one of the judgment-debtors objected to the attachment, and obtained an order under section 239 staying execution of the decree so as to enable him to apply to the Moorshedabad Court to consider his objections. The exact terms of this order are not before us, because the order in appeal is from the Moorshedabad Court, and the

(1) I. L. R., 5 Calc., 897. (2) I. L. R., 8 Calc., 51.

proceedings of the Beerbhoom Court have not been sent up. However, for the purposes of this appeal, it is sufficient to say that the Beerbhoom Court passed an order under section 239. The Subordinate Judge as the Court which passed the decree and the District Judge in appeal have concurrently rejected the objection made by the judgment-debtor, that execution was barred by limitation, and they have relied on the judgment of the Privy Council in the well known case of *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (1). It appears to us that both the Courts have misapprehended this judgment of the Privy Council in applying it to the present case. In that case the objection raised was that the sixth application for execution was barred by limitation, and that therefore the seventh application, that is, the application under which the proceedings were then being taken, was inoperative. Their Lordships held that no objection had been raised in the course of the proceedings taken on the sixth application, but that the debtor had appeared, and in applying for the postponement of the sale had submitted to the attachment of his property. The Privy Council accordingly held that the Court could not re-open the previous proceedings. In the case before us, the objection is taken to the application now before the Court. The District Judge appears to have held that the objection of limitation cannot be allowed to be raised by the judgment-debtor, because he has submitted to certain proceedings in the Beerbhoom Court. But the only proceeding taken by that Court against him was one of attachment of his property, and the judgment-debtor forthwith objected to such attachment, and obtained an order from the Court staying further proceedings under s. 239. There was consequently no adjudication of this point against the judgment-debtor in the Beerbhoom Court.

The next question raised is whether the Moorshedabad Court had any jurisdiction to entertain such objection, the decree having been transferred to the Beerbhoom Court for execution. The terms of ss. 239 and 242 seem to us to recognise the jurisdiction of the Moorshedabad Court. The cases which have been cited to us merely show that the Court to which a decree has

(1). I. L. R., 8 Calc., 51.

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been transferred for execution has jurisdiction to determine an objection of limitation, such as has been raised in the present case; but none of the cases go so far as to exclude the jurisdiction of the Court which passed the decree. In the present case the notice under s. 248 was passed by the Moorshedabad Court, and the judgment-debtor before us also contends that his objection that no service of this notice was made should be heard by that Court. One of the objects of serving such a notice is to enable the judgment-debtor to object to execution of the decree because it is barred by limitation, and therefore we also think that the Moorshedabad Court from which the notice issued would be the proper Court to determine this matter, although it might also have been raised and decided by the Court at Beerbhoom. We may refer to s. 224 (*c*) under which the Court sending a decree for execution by any other Court is required to send a copy of any order that may be passed for the execution of the decree. In this case we apprehend that the Moorshedabad Court would have sent a copy of the order made by it on receipt of the report of the service of the notice under s. 248. As it has been held that, but for *Mungal Pershad Dichit's* case, execution of the decree is barred by limitation, and that case, in our opinion, does not apply, the order of the lower Court must be set aside and its finding on the actual facts accepted. In substitution for the orders passed, it will accordingly be declared that execution is barred by limitation. The judgment-debtor will receive his costs of all the Courts.

P. O'K. *Appeal allowed.*

Before Mr. Justice Mitter and Mr. Justice Agnew.

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April 30.

MISRI LAL AND OTHERS (FIRST PARTY, DEFENDANTS) *v.* MOZHAR HOSSAIN (PLAINTIFF) AND OTHERS (SECOND PARTY DEFENDANTS.)*

Mortgage—Mortgage of crops that may be grown upon a certain plot of land, its nature and effect—Transfer of Property Act—Contract Act.

The mortgage of indigo crops that may be grown upon a certain plot of land is a valid transaction.

* Appeal from Appellate Decree No. 1251 of 1885, against the decree of Moulvi Abdul Aziz, Khan Bahadoor, Subordinate Judge of Sarun, dated the 17th of March 1885, affirming the decree of Baboo Nepal Chunder Bose, Munsiff of Sewan, dated the 19th of August 1884.

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The plaintiff appealed to the High Court.

Baboo *Jogindra Chunder Ghose* for the appellant.

Mr. *M. L. Sandel* for the respondents.

The judgment of the Court (MITTER and NORRIS, JJ.) after setting out the facts as above, proceeded as follows:—

In this second appeal it has been urged that the defendants, respondents, are not entitled to re-open the question of jurisdiction in the Appellate Court, they having not preferred any appeal against the Munsiff's decision upon this point. We are of opinion that this contention is not valid. The defendants, respondents, were entitled to answer the plaintiff's appeal upon the ground that the Munsiff had no jurisdiction to entertain the suit. We think therefore that there is no force in this contention.

The second ground that has been urged before us is that the finding of the Subordinate Judge that the value of the property in dispute is more than Rs. 1,000, does not necessarily lead to the conclusion that the Munsiff had no jurisdiction to entertain this suit. It has been contended that the value of the property in dispute in this case is not necessarily the value of the subject-matter in dispute. The plaintiff offered to pay Rs. 700, the consideration money stated in the conveyance to the defendant. That amount at any rate should be deducted from the value of the property in dispute in order to ascertain the value of the subject-matter in dispute.

We are of opinion that the subject-matter in dispute in this case is the right of pre-emption which the plaintiff asserts that he has in respect of the property in suit. The question for decision, in order to ascertain whether the Munsiff had jurisdiction or not, is as laid down in s. 20 of the Bengal Civil Courts Act (VI of 1871)—what is the value of this right? It is not very easy to lay down any general principle for ascertaining the value of a right of pre-emption in any given case. But it is clear to us that it is not the value of the property itself. For example, if a plaintiff seeks to recover possession of a property covered by his *pottah*, and the rent charged upon the property is of considerable amount, the value of the property itself would not be the value of the right which the plaintiff would seek to recover. Therefore

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it seems to us that in determining the question whether the value of the subject-matter in dispute in this case is above Rs. 1,000, the lower Appellate Court has proceeded upon an erroneous principle. As already remarked, it is not possible to lay down any hard and fast rule for measuring the value of a right of pre-emption in any particular case. But the lower Appellate Court in this case, for reasons already given, was not right in measuring it by the value of the property itself without taking into consideration the fact that the plaintiff has offered to pay to the defendant Rs. 700, and would be bound to make the payment before he could succeed.

It has not been shown therefore that the Munsiff was in error in holding that he had jurisdiction to entertain the suit. That being so, the Subordinate Judge's judgment cannot stand. We therefore reverse that judgment and send back this case to that Court to decide the appeal on the merits. Costs will abide the result.

K. C. M. *Case remanded.*

Before Mr. Justice Prinsep and Mr. Justice Beverley.

SRIHARY MUNDUL (JUDGMENT-DEBTOR) *v.* MURARI CHOWDHRY AND ANOTHER (DECREE-HOLDERS).*

1886 *July* 2.

Limitation—Execution of Decree—Jurisdiction of Court where decree was passed—Transfer of decree for execution—Code of Civil Procedure, ss. 223, 239, 248.

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